IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL SUITS No 3 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ASEA BROWN BOVERI LTD.

Versus

O.L. OF POLYSTEELS LTD.

Appearance:

MR GN SHAH for Petitioner

OFFICIAL LIQUIDATOR for Respondent No. 1

MR JT TRIVEDI for Respondent No. 2

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 13/2/2001

C.A.V. JUDGEMENT

1. ASEA Brown Boveri Ltd. - plaintiffs had originally filed Special Civil Suit No. 106 of 1975 before the learned Civil Judge (S.D.), Bhavnagar, somewhere on 15.11.1975. In that suit the plaintiff prayed that M/s. Polysteels (India) Limited, defendant No. 1 hand over possession to the plaintiffs of the materials and components as detailed in annexure-A to the plaint.

2. The facts giving rise to this petition are as under:-

2.1 The plaintiffs are company incorporated under the Companies Act, 1913 carrying on business, inter alia, as manufacturers and sellers of furnace and other eingineering goods. M/s. Polysteels (India) Limited, defendant No. 1, are company incorporated under the Companies Act, 1956, carrying on business, inter alia, as mild and special steel manufacturers. Plaintiffs averred in the suit that a contract was entered into between the plaintiffs and the defendants as contained in the letter dated 15-11-1973 Ex. 33 addressed by the plaintiffs to the defendant and agreed to by the defendant through their Managing Director signing and returning to the plaintiffs a copy thereof at the foot of the said contract. Besides the main terms mentioned in the said letter, general terms and conditions were printed on the reverse of the plaintiffs' letter dated 15-11-1973 which is at Exh. 33 on page 32. The clause pertaining to the terms of the payment as contained in the said contract reads as under:-

"Terms of payment : - 10% of the contract price payable as advance on or before 15.4.1974 and balance 90% of the contract price plus taxes, incidental and many other applicable charges will be paid by you by 90 days Bills of Exchange from the date of despatch under Bills Market Scheme. The payment will however be covered subsequently by IDBI Bills re-discounting Scheme for which you have to furnish a letter of undertaking from your Banker as per draft enclosed. After realisation of all our payments from IDBI, we shall refund the amount received from you through the Bills Market Scheme. Refund will be made for the actual amount received by us and no interest charges will be applicable on the same.

2.2 Clause 15 of the General Terms and Conditions reads as under:

"Proprietary rights - The goods supplied by us shall remain our property until full payment has been made."

2.3 The plaintiffs further averred that as per the terms and conditions of payment, the defendant was to make payment of advance of 10% on or before 15.4.1974 and the balance of 90% of the contract price plus taxes and

incidentals by Bills drawn under the Bills Market Scheme for which the defendant was to furnish a Letter of Undertaking from their Bankers as per draft enclosed therewith. The said payment was to be subsequently covered by IDBI Bills Rediscounting Scheme. It was stipulated that after realisation of all the payments from the IDBI, the plaintiffs were to refund the amount received from the defendant through the Bills Market Scheme without interest. The said clause also provided that in case the defendant was not able to honour any of the commitments, including initial payment and opening of Letter of Credit/honouring of documents sent through Bank, all the payments received till then were liable to be forfeited by the plaintiffs and the plaintiffs also reserved therein the right to treat the order as cancelled in such an event after adjusting the payments received and forfeited as above. It was further averred that the defendant addressed a letter dated 25.11.1973 (Exh. 34 page 80) to the plaintiffs by which, the defendant wanted the terms of payment to be altered as to make payment of entire 100% of the contract price under the IDBI Scheme and not to pay 10% advance as provided in the terms of payment as contained in the plaintiff's letter dated 15.11.1973. The plaintiff however by their letter dated 12.12.1973 Exh. 35 did not agree to the said alteration suggested by the defendant and the plaintiffs insisted that 10% of the contract price be paid by the defendant on or before 15.4.1974 which amount would be refunded to the defendant after realisation of the entire payment under the IDBI Scheme.

2.4 The plaintiffs further contended that in view of the aforesaid correspondence, a firm contract was arrived at between the plaintiffs and the defendant under which the plaintiffs were to deliver Arc Furnace Type SSKD 340, as detailed in the plaintiffs' letter dated 15.11.1973, on the terms that the defendant should pay 10% of the contract price on or before 15.4.1974 which would be refunded to the defendant when 100% of the value of the goods was paid under the IDBI Scheme and under which the property in the said Arc Furnace or any of its components was not to pass to the defendant till payment of the full price to the plaintiffs. It was further averred that in view of this contract, the property in Arc Furnace and its various components was to continue to remain in the plaintiffs custody and was not to pass to the defendant until all the material specifications were supplied and were paid for in full. It was further averred that in the suit that the entire basis of the contract was that the property in the goods was to pass to the defendant on the defendant making the requisite financial arrangements

for payment so as to enable the plaintiffs to raise bills of exchange on them and on the plaintiffs being paid the price in full of the said Arc Furnace. It was further averred that unless and until there was a complete delivery so as to constitute Arc Furnace Type SSKD-340 with all the material specifications and components, it did not constitute an Arc Furnace as contemplated by the contract which could be put by the defendant to use and unless the required financial arrangements were made and the price was paid in its entirety, the property in the goods was not intended to pass from the plaintiffs to the defendant.

2.5 The plaintiffs further averred that the defendant had failed to make payment of 10% contract price as contemplated by the plaintiffs' letter dated 12.12.1973. However, on the faith and confidence that the defendant would be able to complete the financial arrangements by the time all the materials and components so as to constitute the Arc Furnace Type SSKD-340 were despatched and unloaded at the site of the defendant, the plaintiffs started for their own exigencies, transporting such of the components and materials as were ready with them to the site of the defendant's factory at Bhavnagar. It was further averred that by 30.8.1974, the material and components as specified in Annexure-A to the plaint were despatched by the plaintiffs to the defendant' factory at Bhavnagar. However, the said materials and components did not constitute the entirety of the materials as specified in Annexure-C to the plaintiffs' letter dated 15.11.1975 (Suit Contract). It was further averred that the said material and components as mentioned in Annexure-A to the plaint despatched by the plaintiffs to the defendant's factory site at Bhavnagar did not constitute Arc Furnace Type SSKD-340 as contracted between the parties. It was further averred that the property in such materials and components remained with them and did not pass to the defendant who held such materials and components for and on behalf of and as trustees for the plaintiffs. The plaintiffs further averred that the defendant could not make the necessary financial arrangements and the defendant addressed a letter dated 2.10.1974 Exh. 36 (page 84-86) to the plaintiff wherein the defendant has stated as under:

"It was our very clear understanding that the despatches would start only after finalisation of the technical as well as financial formalities. As you were very eager to deliver the machine pending the formalities and that too without our confirmation, we do not know what to do with the

components and the machineries dispatched to us, and as such, we would request you to kindly let us know whether you want us to keep this on your account with us. Please note that we will not be held responsible for any loss or damage that might occur and however, assure you that the same would be kept with us, till we hear from you, in safe custody. Here, we also would like to inform you that the freight charges, that we have paid, would be recovered from you and kindly let us know upto what period we have to hold the materials on your behalf, but please note that the same would be at your risk and consequences."

2.6 It was further averred that as the defendant having failed to pay the price in its entirety, the property in the goods was not intended to and did not in fact or law pass from the plaintiffs to the defendant.
2.6(a) It was further averred that the defendant by their letter dated 2.10.1974 clearly stated that the materials and components which were despatched by the plaintiffs till then would be lying in their safe custody on the plaintiffs' account and at the plaintiffs' risk and consequences.

2.7 The plaintiffs went on insisting upon the defendant to complete the financial arrangements so as to enable the plaintiffs to raise the bills and recover the price, whereupon the property in the transported materials and components would pass in favour of the defendant and also to enable the plaintiffs to despatch further materials as per the contract so as to constitute delivery of the contracted Arc Furnace Type SSK 340.

2.8 It was further stated that the defendant' financial position was sinking and the defendant could not make the requisite financial arrangements and the plaintiffs therefore by their Attorney's Notices dated 24.9.1973 Exh. 98 page 171 and 11.10.1974 Exh. 100 page 175 recorded that in view of the defendant' failure to make financial arrangements the contract was cancelled and demanded back possession of the materials and components transported to the defendant' factory at Bhavnagar and lying in the defendant custody on the plaintiffs' account and at the plaintiffs' risk and consequences as mentioned by the defendant in their letter dated 2.10.1974. The plaintiffs' representative went to the factory of the defendant on 30.9.1975 for the specific purpose of taking back possession of the materials and components transported by the plaintiffs to the defendant and lying in the factory premises of the

defendant at Bhavnagar, but the plaintiffs' representative was refused by the Commercial Manager of the defendant as he had no authority to deliver the goods to the plaintiffs. The defendant addressed a letter dated 3.10.1975 Exh. 99 (page 174). Thereafter, a letter dated 11.10.1975 was addressed to defendant No. 1 by the plaintiffs which is at Exh. 100 page 175 and stated that they are treating the contract as cancelled. Defendant No. 1 also addressed a letter dated 22.10.1975 to the plaintiffs in which they stated that they were the owners of the goods and the plaintiffs have no claim over the goods.

3. In view of the same the plaintiffs filed the present suit for decree directing the possession of the specific goods and materials as detailed in Annexure-A to the plaint. As indicated earlier the said suit was filed before Bhavnagar Court on 15.11.1975. The plaintiffs also by a separate application prayed for appointment of an interim receiver to give delivery of these goods and materials to the plaintiffs and in the meanwhile for interim relief as prayed for therein.

3.1 The learned Civil Judge (Senior Division), Bhavnagar, had issued a notice on 15.11.1975 to defendant No. 1 regarding application of the plaintiffs for the appointment of the receiver and injunction. It may be noted that defendant No. 2 Bank of India was not impleaded as party by the plaintiff originally.

3.2 Defendant No. 2 had through their advocate filed a purshish in the said suit on or about 20.12.1975 before the learned Civil Judge (S.D.) at Bhavnagar (page No. 89-A) stating that defendant No. 2 was a secured creditor and will file an application or written statement opposing the application of the plaintiffs. No written statement, as stated in the purshis, was however filed by defendant No. 2, before the court at Bhavnagar.

4. It appears that the defendant No. 1 Company's financial position was not good. Therefore, Company petition No. 31 of 1975 was filed before this court and in that this court passed order dated 9.12.1975 appointing provisional liquidator and thereafter in Company matter the present plaintiff filed an application being Company Application No. 73 of 1976 before this court. This court (coram: D.A. Desai, J as he then was) by his order dated 6.5.1977 was pleased to order as follows:

"(b) The Official Liquidator attached to the High Court of Gujarat as prvisional/official liquidator of respondent Company is directed to deliver to the applicant the components of electric arc furnace, the particulars of which components are set out in Annexure-A to the affidavit dated 21.6.1976.

(c) The applicant shall give an undertaking to the court to the effect that in the event of the applicant not succeeding in Suit No. 106 of 1975 filed by them against the respondent Company in the court of Civil Judge (Senior Division) at Bhavnagar on 15th November, 1975, the applicant shall pay to the Bank of India as secured creditor, the market value of the said components of electric arc furnace as valued by the aforesaid independent valuer.

(d) The applicant shall before taking delivery of the said components of electric arc furnace, furnish a Bank guarantee, preferably of a Nationalised Bank, in favour of the Bank of India to the extent of the market value of the said components of electric arc furnace as valued by the aforesaid independent valuer so that in the event of the applicant failing to make payment of the market value of the components to the Bank of India, when the applicant not succeeding in the aforesaid suit filed in the Court of Civil Judge (Senior Division) at Bhavnagar, the said guarantee shall immediately become enforceable and the Bank of India will become entitled to recover from the guarantor Bank the amount of the present market value of the components of electric arc furnace. The applicant to keep such Bank guarantee alive and binding till the decision of the said Suit."

4.1 Pursuant to the aforesaid order ultimately the applicant furnished necessary bank guarantee before this court and ultimately received goods. Copies of the said bank guarantee which were dated 8.1.1982 and 12.1.1982 have also been placed before this court.

4.2 In view of the aforesaid proceedings the Hon'ble Court had transferred Suit No. 106 of 1975 for trial before the High Court and it has been renumbered as Civil Suit No. 3 of 1980. Defendant No. 2 had filed an application in the High Court on 15.3.1982 stating that it should be made a party defendant to the said suit.

The Court by its order dated 15.3.1982 had directed that defendant No. 2 should be added as party and accordingly the title of the plaint was amended on 15.3.1982.

4.2(a) Defendant No. 1 the official Liquidator on behalf of Polysteel Ltd., did not file written statement.

4.2(b) Defendant No. 2 filed its written statement in O.J. Suit No. 3 of 1980 on 3.5.1982 at Exh. 38. Defendant No. 2 stated that Arc Furnace was to be sold on credit and the property in the said Arc Furnace was to pass on the delivery of the material and components at the plaintiffs' or their sub-suppliers' Works in different parts of the country. It was further submitted that the general terms and conditions printed on the overleaf of the letter dated 15.11.1973 were not part of the terms of the contract and they cannot govern or regulate the contractual relationship inter se between the parties. It was stated that clause 15 of the general terms and conditions was not agreed upon inter se between the parties and it cannot govern the relationship. It was stated that on the principle of construction of documents, to the extent the general terms and conditions run counter to the specific terms agreed upon, they must give way to the specific terms agreed upon between the parties. It was further submitted that defendant No. 2 denied that the property in the said arc Furnace or any of its components was not to pass to the defendant No.1 till payment of the full price to the plaintiff as alleged. It also denied that the property in Arc Furnace and its components was to continue to remain in the plaintiffs and was not to pass to defendant No. 1 until all material specifications were supplied and were paid for in full. It is also denied that the property in the goods was not intended to pass from the plaintiff to defendant No. 1 until all the components and materials as per the specifications were supplied, they were assembled and installed at the factory premises of defendant No. 1. Defendant No. 2 further submitted that the plaintiffs have voluntarily without waiting for the finalisation of the financial arrangements guaranteeing payment under IDBI rediscounting Scheme had despatched the components specified in Annexure-A.

4.3 Defendant No. 2 has relied on reply given by defendant No. 1 on October 22, 1975 to plaintiffs attorney which has been produced at Exh. 101 at page 176 in which it has been stated that the goods have been passed on to defendant No. 1 and it was the holder of the goods and that the contention that the goods were lying with defendant No. 1 on account of plaintiffs. It

was stated that once the goods are sold and delivered and the property in the goods had passed, the seller is only entitled to receive the price. It was stated in case of failure on the part of the buyer to pay the price, the seller can file a suit and in case of insolvency lodge its claim in winding up or in insolvency. It was admitted that due to order of the Company Court goods have been taken by the plaintiffs. However, that fact will not alter the mutual rights and obligations and the respective rights and obligations will be determined on the basis of the outcome of the suit.

4.4 When the matter was placed for hearing before the Court (Coram: A.M. Ahmadi, J as he was then) on 16.8.1983, this Court was pleased to pass the following order:-

> "The documents at 5 Nos. 2 to 6 of Exhibit 4 to be exhibited as there is no objection from the opposite parties.
>
> Mr. G.N. Shah for the plaintiff states that he does not propose to lead any oral evidence on behalf of the plaintiffs. Mr. B.R. Shah for defendant No. 2 also states that he does not propose to lead any oral evidence in the matter but after inspection of documents from the official Liquidator, he may rely on such documents as he considers relevant to the subject matter which will be produced before the next date. Mr. Patel for the Official Liquidator also states that he does not propose to lead any oral evidence in the matter. S.O. to 30th August, 1983."

4.5 Thereafter on 30.8.1983, the following issues were framed: (at Ex. 38)

> 1. Whether the plaintiffs prove that the property, namely, the components of the Arc Furnace did not pass to the first defendant for non-fulfilment of the contract terms?
>
> 2. Whether the general terms and conditions printed overleaf the letter dated 15th November 1973 form part of the contract governing the relationship between the parties?

3. Whether the components delivered by the plaintiffs to the first defendant constituted an arc furnace for which the contract was executed?

4. Whether it is open to second defendant to contend that the said property passed to the first defendant in view of the first defendant's letter dated 2nd October, 1974?

5. Whether the second defendant proves that the plaintiffs had waived or forgone the rights conferred upon them under the contract by voluntarily delivering components of the arc furnace to the first defendant?

6. To what relief or reliefs are the plaintiffs entitled?

4.6 Bank of India, defendant No. 2 has filed an application dated 26.9.1983 and filed certain documents in this behalf Exh. 39 in which it has been stated that the plaintiff has made available a file of the correspondence exchanged between the parties in respect of the suit transaction. The copies of the documents produced along with a separate list from the said file are material for determining the matters at issue between the parties. The same may kindly be taken on record. It appears that the list of documents as mentioned along with the documents has been duly signed by the advocate for the defendant on 26.9.1983. All these correspondences were shown to me in this behalf.

4.6(a) The hearing of the aforesaid matter started in June 2000. Shri G.N. Shah, learned Sr. counsel along with Ms. Minoo Shah, learned advocate, appeared on behalf of the plaintiffs.

4.7 It was submitted that the plaintiffs had entered into an agreement Exh. 33 (pages 32-79) with defendant No. 1 for the manufacture of erection and supply of one complete electric arc furnace subject to the general terms and conditions. The plaintiffs relied on condition No. 15 of the general terms which provided that the goods supplied by us (plaintiffs) shall remain our property until full payment has been made. The plaintiffs therefore contended that the present suit is not for the recovery of the price / value of the parts or the components of electric arc furnace delivered to

defendant No. 1.

4.8 It was submitted that in course of time certain components of electric arc furnace were delivered to defendant No. 1 by the plaintiffs. Defendant No. 1 had written a letter dated 2.10.1974 Exh. 36 (pages 84-86) stating that the components were despatched before defendant No. 1 could finalise financial arrangements and therefore the same were lying in the custody of defendant No. 1 Polysteels. It was further stated that Defendant No. 1 would not be responsible for any loss or damage may cause to the components. The same would have to be borne by the plaintiffs. Defendant No. 1 agreed to keep the same in safe custody (account of the plaintiffs). Defendant No. 1 claimed refund of freight charges paid by it. The components were held by defendant No. 1 at the risk and costs of the plaintiffs.

4.9 It was further submitted that the plaintiffs were the owners of the components. Defendant No. 1 since 1974 was merely a custodian or a trustee of the components for the benefit of the plaintiffs. Consequently defendant No. 2 on behalf of defendant No. 1 cannot now contend after the lapse of 26 years that defendant No. 1 was the owner of the goods and therefore defendant No. 1 is now represented by the Official Liquidator. Further defendant No. 1 has not filed any written statement contesting the claim of the plaintiffs for the recovery of the components. It was stated that defendant No. 2 was not a party defendant in the suit. Therefore, as far as the plaintiffs are concerned, defendant No. 2 was not concerned or interested in the suit since the property belonged to the plaintiffs and not to defendant No. 1.

4.10 The learned counsel for the plaintiff has relied on certain provisions of Sale of Goods Act . Section 4(3) of the Sale of Goods Act, 1930 provides for Sale and Agreement to Sell and so far as it is material for the present purpose. The relevant portion is quoted as under:

"Sec. 4(1) - A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

Sec. 4(2) A contract of sale may be absolute or conditional.

Sec. 4(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell."

4.10(a) He has also relied on Section 16 of the Sale of Goods Act which provides for implied conditions as to quality or fitness. Section 17 provides for sale by sample. Section 18 provides for goods must be ascertained. Section 19 provides for property passes when intended to pass. The material portion for the present purpose is quoted as under:-

"Sec. 19(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

19(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

19(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer."

4.10(b) Section 20 provides for specific goods in a deliverable state. Section 30 provides for seller or buyer in possession after sale, Section 31 provides for duties of seller and buyer, Section 32 provides for payment and delivery are concurrent conditions and Section 33 provides for rules about delivery.

4.10(c) It was submitted in this case that there was no complete sale. It was submitted that the property in goods has not been transferred from seller to the buyer, namely from plaintiff to defendant No. 1. There is no regular sale contract. It becomes executed sale the moment the property has been passed to the buyer. It was submitted that in the present case in view of the terms and conditions referred to earlier, when the full payment was not paid by defendant No. 1 to the plaintiffs, the property in goods had not been passed to defendant No. 1

in this behalf.

4.11 It was submitted that the property in goods has not been transferred from the plaintiffs to defendant No. 1 and therefore in any view of the matter defendant No. 1 was not the owner of the property in this behalf and the plaintiffs have right to file the present suit.

4.12(a) The learned counsel has also relied on the judgement of the Bombay High Court in the case of FORD AUTOMOBILES (INDIA) LTD. VS. DELHI MOTOR CO. reported in AIR 1923 Bombay 125. The judgement was delivered by Mulla, J wherein on page 129 the learned Judge has observed as under:-

> "If S. 83 of the Indian Contract Act applies to the case, it appears to me that the plaintiffs having instructed their agents not to deliver the railway receipt till payment, the appropriation was not absolute and final, but conditional on payment by the defendant, and that there was therefore no `appropriation' within the meaning of that section.
>
> I, therefore, hold that the property in the cars did not pass to the defendant on delivery to the railway company and that the defendant are not liable for the price."

4.13 He has also relied on the judgement of the Hon'ble Supreme Court in the case of VANGUARD ROLLING SHUTTERS VS. S.T. COMMR. reported in AIR 1977 SC 1505 in which it is inter alia held thus:

> "Held, in the instant case, the contract could not be completed merely by sending the materials at the site but would be completed only after erection of the shutters had been made and the shutters fixed to the premises so as to become an accretion to the premises."

4.14 He has also relied on the decision in the case of IBRAHIM VS. UNION OF INDIA, W. RLY. reported in 5 G.L.R. 879 in which on pages 885-886 it is observed thus:

> "The main principle relating to the transfer of property in goods is to be found in Section 19 of the Indian Sale of Goods Act and that section states that "Where there is a contract for sale

of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred". Sub-section (2) of Sec. 19 further provides that "For the purpose of ascertaining the intention of the parties regard shall be bad to the terms of the contract, the conduct of the parties and the circumstances of the case". Sub-sec. (3) of Sec. 19 provides that "Unless a different intention appears, the rules contained in Secs. 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer". Therefore, for the purpose of ascertaining as to whether the property or any interest in the goods has or has not passed, the material question to be considered in each case is whether the parties did or did not intend at the time when the endorsement was made and the railway receipt was delivered that the property or interest in the goods should pass and this has got to be ascertained with reference to the terms of the contract by which the sale of goods took place, the conduct of the parties, and the circumstances of the case. Under the circumstances, in our judgement, it is not possible to agree with the wide proposition canvassed for by Mr. Majmudar that a mere endorsement, by itself, without anything more, but accompanied by a delivery of the receipt, transfers property or interest in the goods."

4.14(a) He has also relied on the judgement of this court in the case of M/S. MANIAR NAROTTAMDAS DHARAMSHI VS. BARJATYA TRADERS reported in 21(2) G.L.R. 89 in which at para 9 on page 98 a reference was also made to the decision in the case of IBRAHIM VS. UNION OF INDIA (5 G.L.R. 879).

4.14(b) He has further relied on the decision in the case of THE STATE OF GUJARAT VS. SWASTIK BANSIDHAR ENGINEERING LTD. reported in 1973 GSTB 213 (volume published by Gujarat Sale Tax Bar Association) (Guj.) in which on page 216 it is observed as follows:

"What is material for the determination of question as to when property in goods passes from the buyer to the seller is the intention of the parties and this intention may be gathered from the terms of the contract, conduct of the parties

and the circumstances of the case."

4.14(c) He has also relied on the decision of this court in the case of CHAMPAKLAL ODHAVJI VS. THE STATE OF GUJARAT reported in 1981 GSTB 1 (Guj).

4.15 The plaintiffs also relied on paras 706, 707 at page 648 of Halsbury's Laws of England, 4th Edition, which is reproduced below:

"Para 706 - Intention governs - The intention of the parties, as shown by the terms of the contract, the conduct of the parties and the circumstances of the case, determine the time when the property in the goods is to be transferred.

Para 707 -A reservation of the legal title will normally prevent the goods from forming part of the general assets of the buyer in the event of his insolvency, at least so long as they remain in the form in which they were sold.

Para 708 - Rules for ascertaining intention - The rules which follow other than the rule as to unascertained goods are rules for ascertaining the intention of the parties as to the time at which the property is to pass to the buyer where the express contract is silent upon the point. They have no application where the question is expressly dealt with in unequivocal terms in the contract but, like all rules in the Sale of Goods Act, 1979, they will be given weight in construing an express contract which is ambiguous. However, the rule relating to unascertained goods is fundamental to the contract of sale inasmuch as a contract to sell unascertained goods is not a complete sale but a promise to sell."

4.16 He has also relied on Benjamin's Sale of Goods, 4th Edition 1992 particularly on paras 1.025 which provides the contract of sale, statutory definitions; 1.027 which provides for `sale' which reads as under:

"The Sale of Goods Act, 1979, defines a sale in the following passages: first `where under a contract of sale the property in the goods ins transferred from the seller to the buyer the contract is called a sale'; and secondly, `an

agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred'. It is therefore possible for a sale within the statutory meaning to come about in one of two ways: either by a contract which itself operates to transfer the goods from the ownership of the seller to that of the buyer, the property passing when the contract is made; or by a contract which is initially only an agreement to sell, but is later performed or executed by the transfer of the property. In either case it is clear that the sale involves not only a contract but also a conveyance of the property in the goods, and so it may confer on the buyer the right to bring a claim in tort for wrongful interference with the goods as well as rights in contract.

The expression `sale' is sometimes used purely in the sense of `conveyance', so as to refer to that aspect of the transaction which concerns the transfer of the property, divorced from all contractual considerations. Benjamin, writing before the Act of 1893, defined a sale as `a transfer of the absolute or general property in a thing for a price in money' and similarly in the United States the Uniform Commercial Code provides that a `sale' consists in the passing of title from the seller to the buyer for a price. A `sale' in this sense may be accomplished on the making of the contract of sale (in which case it is conveniently termed, as in the United States, a `present sale'), or by the performance of an agreement to sell. The term `sale' is accordingly somewhat ambiguous".

4.16(a) Chapter V provides passing of property, para 5.002 provides for property, possession and risk. The property in the goods is to be distinguished from the possession of them. Para 5.003 provides effect of the passing of property where the title of the buyer. Para 5.005 provides what will be the situation where insolvency of one of the parties - passing of property is a relevant issue where one of the parties to a contract of sale becomes bankrupt or goes into receivership or liquidation. If the property has passed to the buyer, and the seller becomes insolvent, the buyer will be able to claim the goods to the exclusion of the other creditors of the seller; if it has not yet passed to him,

though he has paid the whole or part of the price, he has only a general claim as a creditor in respect of the breach of contract. In the case of the buyer's insolvency, the seller can claim the goods if the property has not passed. Para 5.021 provides for conditional contract, para 5.022 provides for specific goods.

4.16(b) The learned counsel has also relied on para 284 page 181 of the Benjamin's Sale of Goods Act, 3rd Edition, 1987 which provides conditional contract - Where a contract for the sale of specific goods is made subject to a condition upon the fulfillment of which the transfer of property depends, the property will not pass to the buyer when the contract is made, but only when the condition is fulfilled. Until this time the contract takes effect as an agreement to sell, and not as a sale of the goods. Notwithstanding the presumption contained in Section 18, rule 1, the contract may be held to be conditional by virtue of the intention of the parties ascertained in accordance with section 17 or as the result of the reservation by the seller of the right of disposal of the goods.

4.17 Reliance is also placed on RAMAIYA'S SALE OF GOODS ACT, 1995, 4TH EDITION, page 416 where the learned counsel has relied on Section 19 of the Sale of Goods Act. On page 418 the learned counsel has relied on the following:

> "It follows that until the property in goods has been transferred from the seller to the buyer there is no sale. The contract of sale remains merely executory till then; and it becomes executed the moment the property has passed to the buyer."

Again on page 419 it is further observed thus:

> "The section recognizes the rule that in case of an agreement of consideration; whether the consideration consists in some actual performance, as the payment of the price, or in a promise, express or implied, the time of the transfer of property (wherever such transfer is possible) depends upon the intention of the parties, however indicated. And the word `intention' means expressed intention. This is indicated by Sub-section (2). Evidence cannot be received of mental intentions, but merely of what

the parties said or did."

4.17(a) The learned counsel for the plaintiffs has relied on Sale of Goods Act by Mulla and Pollock on page 148 of the 5th edition (edited by R.K. Abichandani, Judge of this High Court) regarding intention of the parties which is as under:

"The governing principle which should determine as to the passing of the property in the goods must be to find out what is the intention of the parties. It is open to the parties to agree that the property shall pass ipso facto immediately the goods become ascertained or even that it shall pass at some time after the delivery is effected."

DEFENDANT'S CONTENTIONS REGARDING PRODUCTION OF DOCUMENTS, AMENDMENT OF WRITTEN STATEMENT:

5. After the hearing of the learned counsel for the petitioner on mertis of the matter over and the plaintiff had concluded the arguments, defendant No. 2, before he starts addressing the matter on merits, filed an application dated 3.7.2000 at Exh. 108 for filing list of documents. By that application defendant No. 2 desired to file the following documents: Mr. J.T. Trivedi and Himanshu Trivedi, learned counsel appeared for defendant No. 2, Bank of India.

1. Hypothecation of movable machinery dated 13.12.1971

2. Certificate of Registration of Charges

3. Copy of Annual Report of 1972-73

4. Supplemental Deed of Hypothecation dated 21.3.1974

5.1 Defendant No. 2 also filed application Exh. 107 on 4.7.2000. Along with the application he produced the list of documents.

5.2 It may be stated that defendant No. 2 has submitted that it is the secured creditor and hypothecation in its favour was executed on 13.12.1971 whereby all machinery has been hypothecated to it. Subsequently, there was a subsequent deed of hypothecation executed on 25.2.1974. The Registrar of Companies already issued Certificate of Registration of

Charge and even the Annual Reports of the Company, defendant No. 1 shows the same. Therefore, it was incumbent upon the plaintiff to have ascertained as to whether there is any existing charge in favour of defendant No. 2 Bank. Under these circumstances, defendant No. 2 stated that the plaintiffs do not have any priority with regard to its alleged claim.

5.3 It was further stated that the Bank Guarantee for Rs. 5 lakhs has been furnished by the plaintiff in favour of the defendant No. 2 and that the instrument thereof also described the correct position. If the defendant No. 2 were not deemed to be a secured creditor, no such order of furnishing bank guarantee in its favour would have been passed. It was taken by the parties to the lis including the plaintiff that the defendant No. 2 is a secured creditor. If it were not so, the defendant No. 2 would not have been joined as a party and that too, after the institution of the suit. If the plaintiff did not want to furnish bank guarantee and the interest of the defendant No. 2 were not required to be protected and the plaintiff did not even prima facie subscribe to such a view, the said order requiring the plaintiff to furnish bank guarantee would have been challenged by preferring an appeal against it. The presence of defendant No. 2 is considered necessary for deciding the suit as it is the secured creditor.

5.3(a) Defendant No. 2 stated that this application for production of documents (Exh. 109) should be allowed in view of the Order 13 Rule 1 of the C.P.C. as the Hon'ble Court has discretion to permit production of documents as the object of Order 13 Rule 1 is not to penalise the parties. In this connection, the learned counsel for the defendant has relied on the decision reported in AIR 1918 PC 11, AIR 1956 Bom. 129. It was stated that no prejudice is going to be caused to the plaintiff by late production of the documents. It was stated that the documents which were supposed to be filed along with the Suit before Debts Recovery Tribunal at Ahmedabad and therefore the same could not be filed earlier.

5.3(b) The learned counsel for the defendant has relied on the judgement of the Bombay High Court in the case of MELAPPA AND ANOTHER VS. GURAMMA AND OTHERS reported in AIR 1956 BOMBAY 129 in which on page 134 the court observed as under:

"Then under R. 2 of O. 13 documentary evidence in the possession or power of any party which should have been, but has not been produced will

not be allowed to be received at any subsequent stage of the proceedings unless good cause is shown. If, therefore, defendant 3 wanted to rely upon this piece of evidence, it was upto him to produce this letter, in the first instance, at the initial stage or to produce it at a subsequent stage upon good cause being shown."

5.3(c) Learned counsel for the defendant No. 2 has relied on the judgement in the case of SAIFUDDIN MOSINALI VS. VORA RAJABALI TAIYABALI reported in 1983(1) G.L.R. 91 in which at para 4 on page 92 the court observed as follows:

"Order 13, Rule 1 of the Code of Civil Procedure requires the parties to produce all the documentary evidence intheir possession at or before the settlement of issues. The object of the said Rule is to see that such evidence is produced at the earliest. Like other procedural Rules contained in the Code, this Rule is intended to secure speedy and orderly conduct of the suit. Obviously, the parties cannot be permitted to produce documentary evidence as and when they like merely because they are willing to pay cost of the other side. This Rule is intended to be complied with and the party committing a default undertakes the risk of his documents being rejected. Order 13, Rule 2 in clear terms provides for the consequences. Though this provision is to be construed liberally so as to advance the casue of justice, it cannot be urged that even if no good cause is shown for late production, it must be permitted on payment of cost. It is not a matter of right of the party, but a matter of discretion of the Court. The decision relied upon does not lay down such an absolute proposition as canvassed by the petitioner. In that case the defendant had shown that an irrepairable injury was likely to be caused to him if he was not allowed to produce the said documents. This circumstance together with other circumstances of the case was regarded as a good cause and for that reason it was observed that production of documents even at the late stage should have been allowed by awarding costs to the plaintiff."

5.4 He also filed an application for amendment of wht written statement on 4.7.2000 wherein he wanted to add para 19 to the written statement. That application is at

Exh. 110. By that application defendant No. 2 submitted that all those documents which are sought to be produced are relevant for deciding the suit. Therefore, in the interest of justice the same may be allowed to be produced on record. He relied on certain decisions which have been mentioned in the application. As regards amendment to written statement, he submitted that the amendment application can be allowed at any stage and proposed amendment does not change the nature of the defence. By way of amendment he wanted to state that defendant No. 2 is the secured creditor and a hypothecation in its favour was executed on 13.12.1971 whereby all the machinery, present and future has been hypothecated to it. Subsequently, there was a supplemental deed of hypothecation executed on 25.2.1974. The Registrar of Companies has already issued Certificate of Registration of Charge and even the Annual Reports of the Company shows defendant No. 1 the same. Therefore, the said amendment ought to have been allowed in this behalf.

5.4(a) It is stated that defendant No. 2 seeks amendment of the written statement by adding para 19 to the written statement and in that it was stated that defendant No. 2 is a secured creditor and hypothecation in its favour was executed on 13.12.1971 whereby all the machinery, present and future, has been hypothecated to it and subsequently there was a supplementary Deed of hypothecation executed on 25.2.1974. Therefore, the plaintiffs do not have priority with regard to any alleged claim. It was stated that amendment can be allowed at any stage. As indicated earlier, defendant No. 2 contended that this amendment will not prejudice the case put forth by the plaintiff in any manner whatsoever. It was submitted that defendant No. 2 was a secured creditor and even the annual reports of material time reveal that defendant No. 2 is the secured creditor and a duty was cast upon the plaintiff as a reasonable and prudent person to have gone through those reports.

DEFENDANT'S ARGUMENT ON THE MERITS OF THE MATTER:

5.5 Defendant No. 2 further submitted that there has been an evolution of law about the position of the unpaid seller, which relies upon what is known as `title retention' clause. Such arrangement between the plaintiff and defendant No. 1 creates a defeasible interest by way of charge which is voidable for non-registration. The learned counsel for defendant No. 2 has relied on two English decisions namely, MODELBOARD

LTD. VS. OUTER BOX LTD., reported in (1993) BCCL 623 and Comapq Computer Ltd. Vs. Abercorn Group Ltd. (t/a Orisis) & Ors. reported in (1993) BCCL 603. It is stated that defendant No. 2 is a public bank and its stand is just and proper. Therefore, the suit may be dismissed with costs. He has relied on Section 125(4) and 4(e) of the Companies Act.

5.5(a) Learned counsel for the defendant has relied on the commentary from the book of Companies' Act, A. Ramaiya, 14th Edition, 1998 on page 1142 which is below Section 125 under Title Retention Clauses:

"A firm sold computers to a buyer on terms containing a title retention clause and constituting the buyer a bailee of the goods till the proceeds of the goods were accounted for to the sellers. The buyers executed two fixed and floating charges on its book debts by discounting its invoices with a finance company. The buyers went into liquidation. The security holder contended that the seller's title retention caluse amounted to a charge on the goods for their price and the same having not been registered, was void against the liquidator. The court agreed with this contention. The beneficial interest which the sellers had in the proceeds of the sale would come to an end when the debt due to the seller was paid. The seller could also sue the buyer if the proceeds of the goods were not sufficient to meet the seller's claims. The court said that in the light of these factors it appeared that the relationship between the parties was more characteristic of a charge rather than the relationship of trustee and beneficiary. It being a charge, it should have been registered and being not registered it was void against the liquidator. Compaq Computers Ltd. V. Abercorn Group Ltd. (1993) BCLC 602 (Ch D). Mummery J summarised the developing legal position on the subject as follows (at pp 611-612)

"The accumulation of decisions on retention of title clauses since the Romalpa case, (1976) 2 Ell ER 552, makes it possible to state some well settled principles without the need to refer in detail to the facts and legal discussion in individual cases. The authorities exhibit a wide variety of factual situations. There is, for example, the relatively straightforward case of a

clause retaining title to goods pending payment of the purchase price and compliance with other conditions, where those goods remain unchanged and identifiable in the possession of the buyer. A more complicated case is where the goods in which title has been retained by the seller have, after delivery to the buyer but before payment of the price, been mixed with other goods or incorporated with other goods into manufactured articles. This case is concerned with the even more complex situation where the seller has not been paid the price of the goods or other sums owing to him, and the buyer has sold the goods to a sub-purchaser who has either paid the price of the goods to ghe original buyer or is under a contractual obligation to pay for those goods." To this effect is the decision in Modelboard Ltd. Vs. Outer Box Ltd. (1993) BCLC 623 (Ch D). The plaintiff supplied to the defendant a number of cardboard sheet boards. Under the terms of the agreement the goods were to remain the property of the seller until payment of the price, the purchaser acknowledged that he was in possession of the goods as a bailee, the product from processing the goods belonged to the seller and the proceeds of the sale of the goods would be held in trust for him. The buyer-defendant executed a secured debenture in favour of his bank which was duly registered. The defendant went into liquidation. It was held that the arrangement between the parties had created a defeasible interest in the product of the goods and the proceeds of its sale and this constituted in interest by way of charge which was void for non-registration."

5.5(b) Learned counsel for defendant No. 2 has also relied on the judgement of the Hon'ble Supreme Court in the case of PASUPULETI VENKATESWARLU VS. THE MOTOR & GENERAL TRADERS reported in (1975) 1 SCC 770 and stated that under Order 7, Rule 7, relief, courts including appellate courts to take cognisance of events happening after institution of suit. On page 772 at para 4 the Hon'ble Supreme Court observed as under:

"We feel the submissions devoid of substance.
First about the jurisdiction and propriety vis-a-vis circumstances which come into being subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be

> judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is not violated, with a view to promote substantial justice - subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion even as situations for applications of this equitable rule are myriad."

PLAINTIFFS' REPLY TO THE DEFENDANT'S CONTENTION REGARDING AMENDMENT OF WRITTEN STATEMENT AND PRODUCTION OF DOCUMENTS:

6.1(a) Learned counsel for the plaintiff submitted that I should not allow this amendment application and he desired to file reply to the said application and accordingly the learned counsel for the plaintiff-petitioner filed written reply to the application dated 3/4.7.2000 of defendant No. 2 for production of documents as well as amendment of written statement at Exh. 112. Defendant No. 2 filed rejoinder to the said affidavit on 27.7.2000.

6.1(b) The plaintiff therefore contended that the amendment application ought not to have been granted by this court as well as the application for production of documents.

6.1(c) The plaintiff has filed a detailed reply. One of the grounds raised was limitation and documents have been produced after 17 years (i.e. after first application filed in 1983) and amendment is also sought after 17 years and therefore the amendment application is totally inconsitent with and in contravention of its earlier defence. It was stated that this amendment application has been filed after 24 years and therefore, this court

should not allow the amendment in this behalf.

6.2 The learned counsel for the plaintiff contended that the present litigation was started in the year 1975 and defendant No. 2 was aware of the said suit within 30 days of the filing of the suit. Defendant No. 2 appeared through their advocate and requested for time and therefore defendant No. 2 was aware of the suit and the contentions raised by the plaintiff and defendant No. 2 had filed application for amendment after a lapse of 25 years (i.e. for filing of main suit in 1975). Defendant No. 2 had filed its written statement on 3.5.1982. Under the circumstances it was submitted that the amendment application should not be allowed. It was further submitted that the proposed application for amendment is made after the evidence as closed as far back as on 30.9.1983.

6.3 Defendant No. 1 had never contended that it had become owner of the components of the electric Arc Furnace delivered by the plaintiff. Defendant No. 1 has not made any submissions before the court contesting the claim of the plaintiffs in the suit. Defendant No. 1 is deemed to have admitted the claim of the plaintiffs. Defendant No. 2 has therfore no right to contest the claim of the plaintiffs in the suit. Further defendant No. 2 in its written statement dated 3.9.1982 had never contended that defendant No. 1 is the owner of the components delivered by the plaintiffs.

6.4 The plaintiff further contended that clause (2) of the Deed of Hypothecation of movable machinery dated 30.12.1987 executed by defendant No. 1 in favour of defendant No. 2 clearly states that what was being hypothecated was the machinery present and futurebelonging to defendant No. 1. The plaintiffs state that in the present case the components delivered by the plaintiffs to defendant No. 1 did not constitute complete machinery of Electric Arc Furnace. By reason of clause 15 of the contract, the property in the components did not pass to defendant No. 1. Therefore, the Deed of Hypothecation cannot include property which never belonged to defendant No. 1.

6.5 The learned counsel for the plaintiff has relied on the decision of the Hon'ble Supreme Court in the case of RAJKUMAR MOHANSINGH AND ORS. VS. RAJKUMAR PASHUPATINATH AMARSINGH AND ORS. reported in AIR 1970 SC page 45 in which at pagra 8 it was observed as under:-

"Counsel then contended that though the argument

was not raised at an earlier stage, the Senior Raj Kumar should be permitted to amend his pleading to contend that there was a custom in the family under which non-taluqdari estate did not devolve upon a single heir. This case is more than 22 years old and we do not think that we would be justified at this date in allowing the parties to raise a new contention and give it a fresh lease of life."

6.6 He has further relied on the decision of the Hon'ble Supreme Court in the case of HAJI MOHAMMED ISHAQ WD. S.K. MOHAMMED AND OTHERS VS. MOHAMMED IQBAL AND MOHAMED ALI & CO. reported in AIR 1978 SC 798 in which at para on page 801 the Supreme Court has observed thus:

"The amendment of the written statement sought was on such facts which, if permitted to be introduced by way of amendment would have completely changed the nature of their original defence. It would have brought about an entirely new plea which was never taken up either at the time of the dealings between the parties or in the original pleadings. The additional evidence sought to be adduced was in respect of the facts stated in the amendment petition. The High Court rightly rejected all those petitions and we need not mention in any detail the reasons thereof."

6.7 Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of M/S. MODI SPG. & WVG. MILLS VS. LADHA RAM & CO. reported in AIR 1977 SC 680 in which at para 9 it is observed thus:

"The decision of the trial court is correct. The defendant cannot be allowed to change completely the case made in paragraphs 25 and 26 of the written statement and substitute an entirely different and new case."

6.8 The plaintiff in its rejoinder relied on Section 125(4) and 4(e) of the Companies Act which reads as under:

"S. 125. Certain charges to be void against liquidator or creditors unless registered - (1) Subject to the provisions of this Part, every charge created on or after the 1st day of April, 1914, by a Company and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the

liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration in the manner required by this Act within (thirty) days after the date of its creation.

Provided that the Registrar may allow the particulars and instrument or copy as aforesaid to be filed within thirty days next following the expiry of the said period of thirty days on payment of such additional fees not exceeding ten times the amount of fee specified in Schedule X as the Registrar may determine, if the company satisfies the Registrar that it had sufficient cause for not filing the particulars and instrument or copy within that period.

(4) This section approves to the following charges -

(a) to (d) xxxxxx

(e) a charge, not being a pledge, of any movable property of the Company."

6.9 He submitted that the position in law therefore is that the movable property referred to in Section 125 must be of the ownership of the Company. Section 125 does not apply to cases where the property is not of the ownership of the company. In the present case, by reason of clause 15 of the Contract, the property in the components had not passed to defendant No. 1. Therefore, defendant No. 1 was never the owner of the components. The proposed amendment should not be allowed because the amendment would involve a complete change of front in the defence. The Hon'ble Supreme Court had held in the above referred judgement of AIR 1978 SC 798 that an amendment of the written statement based on facts which were neither stated in the correspondence nor in the written statement to bring out a new plea should be rejected. The proposed amendment would deprive the plaintiff of the valuable right accruing to them from the admissions made by defendant No. 2 in the written statement and will irretrievably prejudice to the plaintiffs.

6.10 Learned counsel for the plaintiff submitted that defendant No. 2 has raised the contention for the first time that clause 15 (of the Contract between the plaintiff and defendant No. 1 under which the property

in the components does not pass to the buyer defendant No. 1 till full payment of the price is paid to the seller, the plaintiff) constituted a charge created by defendant No. 1 as owner of the components in favour of the plaintiff for the payment of the price by defendant No. 1. Therefore, such a charge required registration under Section 125 of the Companies Act and because the charge is not registered, the same is void. This contention is for the first time raised, without having so pleaded in its written statement and is raised after a lapse of 18 years of the filing of the written statement by defendant No. 2 in 1982 and that too after the arguments of the counsel for the plaintiff had concluded and the learned counsel for defendant No. 2 was making its submissions.

6.11 Defendant No. 1 had never contended in the suit that it had become the owner of the components of the Electric Arc Furnace delivered by the plaintiff. Defendant No. 1 had not made any submissions before the court contesting the claim of the plaintiff in the suit. Defendant No. 1 is therefore deemed to have admitted the claim of the plaintiff. Defendant No. 2 has no right to contest the claim of the plaintiff in the suit. Further defendant No. 2 in its written statement dated 3.9.1982 had never contended that defendant No. 1 is the owner of the components delivered by the plaintiff.

6.12 The plaintiff states that clause 2 of the Deed of hypothecation of movable machinery executed by defendant No. 1 in favour of defendant No. 2 clearly states that what was being hypothecated was the machinery present and future belonging to defendant No. 1. The plaintiffs state that in the present case the components delivered by the plaintiff to defendant No. 1 did not constitute the complete machinery of Electric Arc Furnace. By reason of clause 15 of the contract, the property in the components did not pass to defendant No. 1. Therefore the Deed of Hypothecation cannot include property which never belonged to defendant No. 1.

6.13 The learned counsel for the plaintiff has also relied on the judgement of the SHIVRAJ VASANT BHAGWAT VS. SMT. SHEVANTA DATTARAM INDULKAR reported in AIR 1997 BOMBAY 242 in which on page 244 at para 8 the Court observed as under:

"We have heard Mr. Dharap, the learned counsel appearing on behalf of the appellant. In the present case, when the claim was filed on behalf

of respondent No. 1. Respondent No. 2 has filed the written statement. In the said written statement, they have not taken a point that at the time of accident, the concerned truck owned by the appellant was carrying coolies more than six and therefore, the is a breach in respect of clause (3) under the caption `Limitation' in the policy. Further, admittedly, no issue was also framed by the trial court. When the factual aspect germane to the aforesaid legal point taken by the respondent No. 2 was conspicuously absent in the Written Statement there was no opportunity to the claimant-Respondent No. 1 as well as to the appellant owner of the truck, to challenge the factual aspect as to in fact, whether there were more than six coolies in the said truck. It is true that in the panchnama, it is stated that there were more than six persons. But in fact, since the specific plea was not taken by Insurance Company challenging the liability based on raising such claim under clause (3), both claimant-Respondent No. 1 as well as the appellant had no opportunity to refute what has been stated in panchnama and therefore, the point taken by Respondent No. 2 Insurance Company at the time of argument and decided by the trial Court in their favour is not a bare point of law, but is really a mixed question of law and fact. In view of the fact that in the Written Statement the said stand was not taken by Respondent No. 2 [[and in view of the fact that no issue to that effect was framed by the trial Court, according to our opinion, appellant's attention was not pointedly drawn towards this important aspect and, therefore, the trial Court ought not to have allowed Insurance Company to take the point which is dependant upon the facts which were not stated in their Written Statement i.e. pleading. The aforesaid point taken by the Insurance Company, according to our opinion, is in variance with their pleadings and, therefore, the Trial Court ought not to have allowed Insurance Company to have advanced that for the first time at the stage of final hearing without allowing Insurance Company to amend their pleadings to that effect."

PLAINTIFFS' REJOINDER TO THE DEFENDANT'S CONTENTION ON MERITS:

7. As regards merits of the matter, the plaintiff has stated as follows:

7.1 In reply to the said contention, the plaintiff submitted that defendant No. 2 had not averred in the new `paragraph 19' that defendant No. 1 was the owner of the components which formed part of its security covered by the Deeds of hypothecation. Therefore, even under the amended written statement, assuming that it is allowed which so far has not been allowed, there is no denial by defendant No. 2. and that the plaintiffs are not the owner of the components. The plaintiffs had filed its reply on 18.7.2000 to defendant No. 2's application for amendment objecting to the amendment of the written statement of defendant No. 2.

7.2 The plaintiff further submits that the bank guarantee which was given by the plaintiff be returned to the plaintiffs on a condition set out in the said order. The said order dated 6.5.1977 provided that an undertaking be given by the plaintiffs in the event of their not succeeding suit No. 106 of 1975 (OJ Suit No. 3 of 1980) filed by the plaintiffs against defendant No. 1. The value of the said materials and components was Rs. 5 lakhs and that such an undertaking was duly filed by the plaintiffs in the court. The operative part of the bank guarantee provides that if the plaintiffs fail and neglect to observe and perform the undertaking given to the court and fail to make payment of Rs. 5 lakhs to defendant No. 2 then only UCO bank should have given the bank guarantee and would give an amount of Rs. 5 lakhs to defendant No. 2 and that in the event of the judgement and decree in Suit No. 106 of 1975 being passed in favour of defendant No. 1 and it being held that defendant No. 1 and/or defendant No. 2 are not entitled to said materials and components then the liability of UCO Bank under the guarantee would cease. The claim of defendant No. 2 under the guarantee would arise only when the plaintiffs fail in the suit. The guarantee is conditional. Therefore, the plaintiffs never conceded that defendant No. 2 was a secured creditor. It was only with a view to protect the interest of the parties that the court had passed an appropriate order in the interest of the parties if the value of the components lying at the plant of defendant No. 1 deteriorate in future either the plaintiffs or defendant No. 2 would suffer avoidable monetary loss.

7.3 The plaintiff further contended that the bank guarantee was given by UCO bank in January 1982 and at that time, defendant No. 2 was not even a party in the

suit. The bank guarantee was given on 8.1.1982. The contention raised in para 3 in the written submission of defendant No. 2 speaks of the future machinery, equipments belonging to defendant No. 1 being hypothecated. Whether defendant No. 1 was or was not the owner of the components delivered by the plaintiffs. If the property in the goods had not passed to defendant No. 1 then it can never be the owner of the components. The basis of the hypothecation was that defendant No. 1 must be the owner of the goods and not the custodian or the pledge or bailey. It would be significant to note that if some items or goods were delivered to defendant No. 1 for job work in which defendant No. 1 would be interested only in the charges for job work, defendant No. 2 could not have claimed that materials belonging to the third party which had entrusted the same to defendant No. 1 for job work constitute the security of defendant No. 2.

7.4 It was further submitted that defendant No. 2 has referred to English decision of the Model Part Limited Vs. Outer Paks Ltd. reported in 1993 BCCL 603. Defendant No. 2 has failed to appreciate that the said judgement which refers the reservation of title by which the charge is created on the price of the goods delivered to the seller. The claim of defendant No. 2 that it was a secured creditor of the components is totally misconceived and is based on the presumption, without any basis of facts or evidence on record.

7.5 The learned counsel for the plaintiff has also relied on the decision in the case of IMAMBANDI VS. HAJI MUTSADDI reported in A.I.R. 1918 PRIVY COUNCIL 11. On page 12 it is observed thus:-

> "It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title."

7.5(a) He has further relied on the decision in the case of LONDON AND CHESHIRE INSURANCE CO. LTD. VS. LAPLAGRENE PROPERTY CO. LTD. AND ANOTHER reported in 1971(1) Ch. 499

7.5(b) Reliance is also placed on the decision in the case of COMPAQ COMPUTER LTD. VS. ABERCORN GROUP LTD. (t/a Osiris) AND OTHERS reported in (1993) BCLC 602 in which it is held thus:

> "Under the agreement any beneficial interest which Compaq had in the proceeds of sale would

come to an end when the debts which Abercorn owed to Compaq were paid. Also, if the proceeds of sale were insufficient to satisfy the claims of Compaq, it could sue Abercorn for the balance. In the light of these factors the relationship between the parties was more characteristic of a charge rather than the relationship of trustee and beneficiary. Since this was a charge that should have been registered under S. 395 of the Companies Act 1985 and it had not been so registered, it was void against the liquidator."

MY CONCLUSION:

8. After going through all the records of the case, submissions of the learned counsel for the plaintiffs as well as the defendant, I decide the following points arising in this matter, as under:

8.1 First I deal with the production of documents. Order 13 Rule 2 reads as follows:

"Order 13 - Production, Impounding and Return of documents - Documentary evidence to be produced at or before the settlement of issues -

(1) The parties or their pleaders shall produce, at or before the settlement of issues, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Courts has ordered to be produced.

(2) The Court shall receive the documents so produced; provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs."

8.1(a) In this case by list Exh. 107 defendant No. 2 desired to produce letter dated 16.6.1977, list of charges outstanding and also details of addition in plant and machineries during period 1.10.1973 to 30.9.1974 along with list of machinery. Defendant No. 2 also decided to produce Exh. 108 i.e. four documents namely certified copy hypothecation of movable machinery dated 13.12.1971, certified copy of certificate of registration charges, copy of Annual Report (which is not on record) and supplemental Deed of Hypothecation dated 21.3.1974. In this case as stated above, the issues have been framed on 30.8.1983. Defendant No. 2 has not shown any

sufficient cause for not producing these documents before settlement of issues. The only ground stated is that production has been occasioned by the fact that the documents were produced in the suit instituted by defendant No. 2 in the court of Civil Judge (J.D.), Bhavnagar and that Suit was transferred to this High Court and again the Suit was transferred to the Debts Recovery Tribunal at Ahmedabad. However, no exact date has been mentioned when the Suit was filed, when the Suit was transferred to the High Court and when it has been transferred to the Debts Recovery Tribunal. In my view Order 13 sub-Rule (1) is intended to prevent belated production of documents so that it may not work injustice to the other party. It contains a direction to the Court not to receive in evidence documents which were in possession and power of the parties but were not disclosed at or before the settlement of issues. It also meant to prevent fraud by the late production of documents. In the case of DEVKANT MISHRA VS. KADAMBARI MISHRA reported in AIR 1984 PAT. 38 when the defendants sought to produce certain doucments at a late stage without good good, it was held that in view of Order 13, Rule 2, the court was entitled to reject those documents. Rule 2 provides that documents which should have been produced at an earlier stage shall not be received at any subsequent stage of the proceedings unless the court is satisfied that there is good cause for non-production of such documents at the earlier stage. Rule 2 does not provide for any particular ritualistic formula in which the order of the court has to be passed. The object of rule 2 is merely to prevent belated production of documents. The phrase `good cause' means adequate, sound and genuine reason and it depends upon the facts and circumstances of individual case.

8.1(b) As indicated earlier, the issues were framed in 30.8.1983 whereas the documents were sought to be produced in July 2000. The applicant has not shown any sound or genuine reason for late production of documents. The application is very vague. I, therefore, reject the said applications Exh. 107, 108 and 109 for production of documents in this behalf.

8.1(c) I quote Order 6 Rule 17 of the Code of Civil Procedure.

"Order 6 pleadings generally -
Rule 17 - The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be

made as may be necessary for the purpose of determining the real questions in controversy between the parties."

8.2 It may be noted that in this case the suit was filed originally in Bhavnagar Court on 15.12.1975. In March 1982 defendant No. 2 was joined as party before this court. On 3.5.1982 defendant No. 2 filed written statement. On 16.8.1983 also defendant No. 2 appeared before this court. On 30.8.1983 issues were framed and further documentary evidence was produced on 26.9.1983 and thereafter only in July 2000 the documents have been produced before this court and amendment is also filed in July 2000. Not only that when the hearing took place of this suit and the arguments of the learned counsel for the plaintiffs were almost over, this amendment application has been filed before this court. In view of the same, the amendment application has been filed after 25 years since the institution of the suit and 17 years after filing of the written statement. The amendment would take away the legal right of the plaintiffs which is accrued to plaintiffs by elapse of time. In my view the amendment would introduce a totally new and inconsistent case and as the application is made at the late stage of proceedings, this application is not to be allowed at this late stage. In my view the plaintiffs' suit would be wholly misplaced by the proposed amendment and therefore also the amendment is not to be allowed. In this connection, I rely on the judgement of the Hon'ble Supreme Court in the case of RAJKUMAR MOHANSINGH AND ORS. (supra), HAJI MOHAMMED ISHAQ WD. S.K. MOHAMMED AND OTHERS (supra), M/S. MODI SPG. & WVG. MILLS (supra). In my view, the proposed amendment will alter and be a substitute of the cause of action on the basis of which the original suit was filed. In my view the amendment raises inconsistent and contradictory allegations in negation to the admitted position of facts. In my view the original contention and the contention raised in the amendment are mutually opposite to each other. The proposed amendment will cause immense prejudice to the plaintiffs' side which cannot be compensated by means of costs. The claim or relief by the proposed amendment is clearly barred by time. The amendment which is seeking time barred relief cannot be permitted to be relief. (See: K. Raheja Constructions Ltd. Vs. Alliance Ministeries AIR 1995 SC 1768). Therefore, there is a gross delay on the part of the defendant No. 2 for production of documents as well as amendment in filing written statement. In the light of the principles laid down by the Hon'ble Supreme Court, I do not propose to allow the amendment application filed

by defendant No. 2.

8.3 As regards merit of the matter, I have considered relevant sections of the Sale of Goods Act, commentary on the Sale of Goods Act by Ramaiya, relevant paragraphs of Halsbury's Laws of England, Benjamin on Sale of Goods Act and also judgement of the Bombay High Court in the case of FORD AUTOMOBILES (INDIA) LTD. (supra), judgement of the Hon'ble Supreme Court in VANGUARD ROLLING SHUTTERS (supra), judgement in the case of IBRAHIM VS. UNION OF INDIA (supra) and in view of the correspondence ensued between the parties, the property in goods has not been transferred from the plaintiffs to defendant No. 1. In fact, it is, no doubt, true that the plaintiffs have delivered part of the goods but that was not complete delivery and in fact defendant No. 1 held the goods on the plaintiffs' account and therefore now it does not lie in the mouth of defendant No. 2 to say that the property in goods have been transferred to defendant No. 1. I have referred to relevant correspondence in this behalf and from the correspondence it clearly appears that the property in goods has not been transferred at the relevant time. In this case defendant No. 1 has not filed any written statement. However, defendant No. 2 has relied on the correspondence but in my view the defendant No. 1 is not permitted to say that the property in goods has been transferred from the plaintiffs to defendant No. 1 at the relevant time.

8.3(a) Regarding passing of the property I have considered sections 19 to 22 of the Act. In my view the goods which are subject matter of contract are specific or ascertained goods and it is possible for the property to pass to the buyer, it becomes necessary to determine whether it has actually passed. It depends upon the intention of the parties, construction of the agreement. In my view in the light of the correspondence the intention of the parties was clear that till the payment is made, the property in goods is not to be transferred to the defendant No. 1 by the plaintiffs though in fact part of the goods were delivered. However even then from the correspondence it appears that the goods was only lying at the defendant's premises in the account of the plaintiff. The defendant had custody of the goods but the property in goods did not pass from the plaintiffs to the defendant. For coming to this conclusion I have considered various authorities in this behalf and also treatise of Sale of Goods Act from Pollock and Mulla and Benjamin on Sale of Goods Act and therefore it is not possible to hold that the property in goods is already passed from the plaintiffs to the defendant. In view of

these facts, the contention of the defendant regarding title retention cannot be accepted.

8.4 Defendant No. 2 has alternatively argued about evolution of law and has relied on certain English decisions as well as commentaries on Ramaiya's Companies Act. As against that, the plaintiffs have stated that in this case as the property in goods has not been transferred from the plaintiffs to defendant No. 1, this contention is not available to defendant No. 2. In fact certain English decisions which have been relied on can be pressed into service only if the property in goods has been transferred from the plaintiffs to defendant No. 2. However, as I have already discussed that the property in goods has not been transferred from the plaintiffs to defendant No. 2, the alternative submission of defendant No. 2 cannot be accepted in this behalf. I have also rejected the applications for production of documents as well as amendment and therefore also it will not be possible for me to consider this alternative submission. As regards the alternative submission, there is no foundation of fact also. I agree with the submissions of the plaintiffs that defendant No. 2 was a secured creditor of the components is totally misconceived and is based on the presumption, without any basis of facts or evidence on record. I have considered the judgement of IMAMBANDI (supra) and other English cases which have been relied upon by the plaintiffs which I have considered earlier. Therefore, the alternative contention of defendant No. 2 cannot be accepted.

9. In view of my aforesaid discussion, I answer the issues which are raised in this case as under:-

9.1 As regards issue No. 1, the plaintiffs satisfactorily proved that the property, namely, the components of the Arc Furnace did not pass to the first defendant for non-fulfilment of the contract terms. The plaintiffs proved that the property in goods did not pass to the first defendant. In this behalf I have already discussed the question of fact from the correspondence and also question of law in this behalf.

9.2 As regards issue No. 2, in view of the general terms and conditions printed overleaf the letter dated 15.11.1973 which form part of the contract governing the relationship between the plaintiffs and defendant No. 1 as contracting parties.

9.3 As regards issue No. 3, the components delivered by the plaintiffs to the first defendant it did not

form complete goods in this behalf and only part of the goods were delivered and not full goods were delivered for which contract was executed and the goods which were delivered were also held by defendant No. 1 on behalf of the plaintiffs. Defendant No. 1 had only custody of the goods and the possession of the goods was with the plaintiffs.

9.4 As regards issue No. 4, I have already discussed the matter in detail and in my view it is not open to second defendant to contend that the said property passed to the first defendant in view of the first defendant's letter dated 2.10.1974.

9.5 As regards issue No. 5, in fact letter dated 2.10.1974 Exh. 36 (page 84-86) clearly states that whether defendant No. 1 holds goods on account of plaintiffs or not and in fact defendant No. 1 has clearly stated that he will not be responsible for any loss or damage that might occur in this behalf. In fact, defendant no. 1 clearly stated that goods has to be at their place only at the risk and consequences of the plaintiffs. This letter clearly shows that the property in goods was not transferred to defendant No. 1 but property in goods is clearly with the plaintiffs.

9.5(a) In view of the specific contention raised by defendant No. 1 in its letter dated 2.10.1974 and in view of the subsequent correspondence particularly the plaintiffs' Attorney's notices dated 24.9.1973 and also further letter dated 11.10.1974 at Exh. 100 property in goods was with the plaintiffs and the plaintiffs did not waive or forgo their rights conferred upon them under the contract by voluntarily leaving the components to the first defendant. In fact, as stated earlier only a part of the goods were delivered and not full goods were delivered and therefore there was no question of any waiving of right on behalf of the plaintiffs.

9.6 As regards issue No. 6, the relief claimed by the plaintiffs plaintiffs in the suit in para 9(a) is granted. However, it may be noted that this court (Coram: D.A. Desai, J) by his order dated 6.5.1977 was pleased to allow the plaintiffs to take the goods from the premises of defendant No. 1. In view of the same, there is no question of further ordering delivery and possession of the goods from defendant No. 1 to the plaintiffs. However, the bank guarantee which has been executed by the plaintiffs pursuant to the aforesaid order of this court be released by the Registrar of this court in favour of the plaintiffs.

9.7 Applications Exh. 107 dated 29.6.2000 for production of documents, Exh. 108 dated 3.7.2000 and Exh. 109 dated 4.7.2000 for productions of documents are rejected on the ground that in this case the issues were framed in 1983 where the applications have been filed in July 2000 and no adequate reasons have been given as to why the applications have been filed so late and the applications do not satisfy the provisions contained in Order 13 Rule 1 of the C.P.C. The amendment application Exh. 110 dated 4.7.2000 is also rejected on the ground of gross delay.

10. I am very beholden to learned senior advocate Mr. G.N. Shah, learned advocate Miss Minoo Shah for the plaintiffs and Mr. J.T. Trivedi and Mr. Himanshu Trivedi who have appeared on behalf of the respondents. These learned advocates have rendered very able assistance in disposing of this very old suit which had already raised certain interesting question of fact and law and without their able assistance I would not be able to dispose of this suit in this behalf.

The suit is allowed with no order as to costs.

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